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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Xfinity Mobile, et al.,

10 Plaintiffs,

11 v.

12 Globalgurutech LLC, et al.,

13 Defendants.
14

No. CV-22-01950-PHX-SMB

ORDER

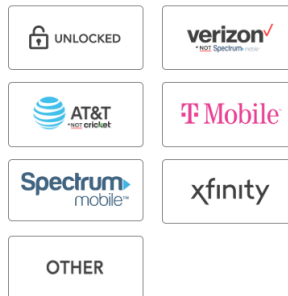
15 Before the Court are Plaintiff Comcast OTR1, LLC and Comcast Cable
16 Communications, LLC for themselves and their Xfinity Mobile brand and Comcast
17 Corporation's (collectively, "Xfinity") Motion for Partial Summary Judgment and
18 Memorandum of Law in Support (Doc. 214; Doc. 220 (sealed version)) and Defendant
19 Jakob Zahara, Globalgurutech LLC ("GGT"), and Guru Holdings LLC's (collectively
20 "Global Guru") Motion for Summary Judgment and Memorandum of Law in Support
21 (Doc. 209; Doc. 210 (sealed version)). The parties have fully briefed both Motions. (*See*
22 Doc. 222 (Xfinity's Response); Doc. 224 (sealed version); Doc. 225 (Global Guru's
23 Response); Doc. 228 (sealed version); Doc. 234 (Xfinity's Reply); Doc. 236 (sealed
24 version); Doc. 237 (Global Guru's Reply); Doc. 241 (sealed version). The parties have
25 also filed their respective accompanying Statement of Facts ("SOF") and Controverting
26 and Separate Statement of Facts ("CSOF" or "SSOF"). (*See* Doc. 205 (Xfinity's SOF
27 (sealed)); Doc. 212 (Global Guru's SOF (sealed); Doc. 226 (Xfinity's CSOF & SSOF);
28 Doc. 230 (Global Guru's CSOF & SSOF (sealed)).) The Court, having considered the

parties' briefs and the applicable law, will grant in part and deny in part Global Guru's Motion for Summary Judgment and deny Xfinity's Motion for Partial Summary Judgment.¹

I. BACKGROUND

Zahara owns and operates GGT and Guru Holdings LLC. (Doc. 205 ¶ 1.) Global Guru is in the business of buying and selling second-hand phones.² (*Id.* ¶ 5; Doc. 212 ¶ 2.) The buying process is relatively straight forward. The seller visits SellLocked.com (previously under the domain name iBuyLocked.com), prompting the seller to select the device he is selling, including iPhones, iPads, Apple Watches, and Galaxy devices. (Doc. 212 ¶¶ 4–5.) The seller then selects the status of the device, e.g., whether the device has “no locks,” is “financed” (also referred to as “carrier locked”), is “blacklisted/blocked” (hereafter, “blocklisted”), or “activation locked.”³ (*Id.* ¶ 6.) The seller then clicks through a series of questions about the device. (*Id.* ¶ 7.) One of the questions directs the seller to select a carrier as shown below.

Select Carrier



¹ Also pending before the Court are Global Guru's Motion for Leave to File Certain Portions of Defendants' Response to Motion for Summary Judgment and Exhibits 4, 5, 10 and 11 of the Response and the Entire Controverting Statement of Facts and Exhibits Under Seal (Doc. 227) and Xfinity's Motion for Leave to Seal Plaintiffs' Reply in Support of Motion for Partial Summary Judgment (Doc. 235). Good cause appearing, the Court will grant both Motions.

² The parties dispute whether Global Guru LLC's involvement in Zahara and GGT's business of buying and selling phones. For purposes of this Order, the Court refers to the Defendants as Global Guru collectively for clarity but does not intend to suggest corporate or business affiliation related to the disputes in this case unless otherwise noted.

³ A “financed” device refers to devices that have a remaining balance owed to a carrier, like Xfinity, manufacturer, or another company. A “blocklisted” device refers to those that a carrier or another company remotely locks, preventing its use. A “activation locked” device refers to devices that are demo models, locked to the activation screen, locked by a passcode, locked to an iCloud account, or has a mobile device management lock.

(*Id.*; Doc. 205 ¶ 18.)⁴ After answering the questions, the seller receives an offer from Global Guru. (Doc. 212 ¶ 7.) If the seller accepts the offer, he or she then mails the device to Global Guru which proceeds to assess the condition and status of the device. (*Id.* ¶¶ 14–15.) That process involves checking the International Mobile Equipment Identity (“IMEI”) number to confirm the device status is correct, e.g., financed or blocklisted, whether the device is new or used, e.g., in its original packaging or damaged, and the carrier. (Doc. 205 ¶ 47; *see also* Doc. 207-4; Doc. 207-5.) If the device is in the condition the seller represented, Global Guru will then submit payment to the seller. (Doc. 212 ¶ 16.)⁵ If the device is in a different condition, Global Guru adjusts the offer to reflect the condition and status of the phone, which the seller could then accept or have the device sent back. (Doc. 205 ¶ 47.) Global Guru, through GGT, then sells the devices in international markets where buyers can purchase the devices for a lower price than if they had bought them from a manufacturer or carrier directly. (Doc. 205 ¶¶ 11–13.)

Global Guru utilizes search engine optimization to drive sellers to its website by increasing the likelihood that a seller will come across the website, i.e., by googling various words or phrases. (Doc. 230 ¶ 30.) Essentially, Global Guru has a marketing company provide analytics and guidance on key words and phrases that searchers often use online, which enables Global Guru to target those words and phrases using organic and paid searches. (Doc. 207-10 at 7–10.) Paid searches generally involve Global Guru bidding on the amount it was willing to pay for each time searchers click a keyword online. (Doc. 230-11 at 2.) Global Guru’s marketing strategy sought out sellers looking to sell blocklisted and financed devices. (Doc. 205 ¶¶ 34, 41; Doc. 230 ¶¶ 46, 54; *see also* Doc. 206-6 at 2–3.)⁶

⁴ Xfinity holds a federal registered trademark to the Xfinity logo depicted in the selection menu. (Doc. 205 ¶ 17.)

⁵ Global Guru does not require the seller to provide any documentation proving ownership of the device. (Doc. 205 ¶ 46.)

⁶ For example, Global Guru would hire a marketing firm to create blog posts that utilize keywords in the headlines and bodies, so when people search for the relevant subject, Global Guru’s website is more likely to populate on the search engine and appear more prominently in the list of search results. (*See* Doc. 205 ¶¶ 13, 24; *e.g.*, Doc. 206-6 at 2–7; Doc. 206-7 at 2–5; Doc. 206-8 at 2–6.) Global Guru utilized one such blog post titled “Can you sell a phone that isn’t paid off?” (Doc. 205 ¶ 13; Doc. 230-5 at 1–3.) Additionally, if

Xfinity does not have any affiliation, either through sponsorship or endorsement, with Global Guru. (Doc. 205 ¶ 4.) Xfinity sells various devices, including Xfinity branded phones, and provides wireless services under the Xfinity Mobile Network. (Doc. 212 ¶ 30.) When customers purchase a phone from Xfinity, they can pay in full or pay under an installment plan. (*Id.* ¶ 31.) The latter relates to financed phones, which Xfinity sells under contracts, including Installment Contracts and Terms and Conditions. (*Id.* ¶ 27.) These contracts require the buyer to only use Xfinity’s wireless service and to pay the relative installments on the device and monthly service fees. (*Id.*) The contracts also prohibit the buyer from reselling the phone. (*Id.*) An essential part of Xfinity’s business model is to provide favorable financing terms for the devices to entice customers who then subscribe to the wireless service and pay the month-to-month fees. (Doc. 205 ¶¶ 28–29; Doc. 230 ¶¶ 38–39.)

Global Guru has bought and sold at least 500 Xfinity phones. (Doc. 212 ¶ 33; Doc. 226 ¶ 33.) Some of these phones included blocklisted phones that were listed as fraudulently obtained or lost or stolen. (Doc. 205 ¶ 40; Doc. 230 ¶ 53; *see also* Doc. 205-3 at 39, 40; Doc. 230-1 at 4; Doc. 230-12 at 15.) For fraudulently obtain devices, fraudsters can purchase a device from Xfinity under a false identity with no money down and immediately turn around and sell the device. (Doc. 205 ¶ 8; Doc. 230 ¶ 14.) Fraudsters may also pose as the account holder to charge the cost of the phone to the account and then sell it for pure profit. (*Id.* ¶ 8; Doc. 230 ¶ 14.)

Based on Global Guru’s purchases and sales, Xfinity filed this lawsuit. Xfinity’s SAC asserts ten counts against Global Guru: (1) Unfair Competition (Count I); (2) Tortious Interference with Business Relationships and Prospective Advantage (Count II); (3) Tortious Interference with Contractual Relations (Count III); (4) Unjust Enrichment (Count IV); (5) Common Law Fraud and Fraudulent Misrepresentation (Count V); (6) Trafficking in Computer Passwords under 18 U.S.C. § 1030(a)(6) (Count VI); (7) Unauthorized Access

a searcher entered the phrase “who buys blacklisted Xfinity phones,” a link titled “Sell blacklisted Phone” populates as the first link in the list and directs the searcher to SellLocked.com. (*See* Doc. 229 at 2.)

1 under 18 U.S.C. § 1030(a)(5)(C) (Count VII); (8) Unauthorized Access with Intent to
 2 Defraud under 18 U.S.C. § 1030(a)(4) (Count VIII); (9) Federal Trademark Infringement
 3 under 15 U.S.C. § 1114 (Count IX); and (10) Federal Common Law Trademark
 4 Infringement under 15 U.S.C. § 1125(a)(1)(A) (Count X). (*See generally* Doc. 143.)

5 Xfinity now moves for summary judgment on Counts I, II, III, IV, IX, X. (Doc.
 6 214.) Global Guru also moves for summary judgment that Xfinity does not have standing
 7 to bring any of the claims and otherwise moves on the merits of all ten counts. (Doc. 209.)

8 **II. LEGAL STANDARD**

9 Summary judgment is appropriate in circumstances where “there is no genuine
 10 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 11 Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of a case under
 12 the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
 13 Factual disputes are genuine when the evidence could allow a reasonable jury to find in
 14 favor of the nonmoving party. *Id.* Summary judgment is appropriate “against a party who
 15 fails to make a showing sufficient to establish the existence of an element essential to that
 16 party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp.*
 17 *v. Catrett*, 477 U.S. 317, 322 (1986). The court views “the evidence presented through the
 18 prism of the substantive evidentiary burden” that applies at trial. *Anderson*, 477 U.S. at
 19 254. And must view the evidence in the light most favorable to the nonmoving party.
 20 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The
 21 court must draw all reasonable inferences in the nonmovant’s favor but must not weigh the
 22 evidence or make credibility determinations. *Anderson*, 477 U.S. at 253, 255.

23 The movant carries the initial burden to demonstrate the basis for a motion for
 24 summary judgment, and “identifying those portions of [the record] which it believes
 25 demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323;
 26 Fed. R. Civ. P. 56(c)(1)(A)–(B). If this initial burden is not met, the nonmovant does not
 27 need to produce anything even if it would have the ultimate burden of persuasion at trial.
 28 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000).

1 However, if the movant meets its burden, the nonmovant then has the burden of
 2 establishing that there is a genuine issue of material fact. *Id.* at 1103. The nonmovant
 3 “must do more than simply show that there is some metaphysical doubt as to the material
 4 facts.” *Zenith Radio Corp.*, 475 U.S. at 586. Bare assertions alone do not create a material
 5 issue of fact, and “[i]f the evidence is merely colorable, or is not significantly probative,
 6 summary judgment may be granted.” *Anderson*, 477 U.S. at 247–50 (citations omitted).

7 **III. DISCUSSION**

8 **A. Standing**

9 Standing requires a plaintiff to have (1) suffered an injury in fact that is (a) concrete
 10 and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) that is
 11 caused by the defendant, i.e., the injury must be fairly traceable to the challenged action;
 12 and (3) it must be likely, as opposed to speculative, that a favorable ruling would redress
 13 the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 650–51 (1992) (“The party invoking
 14 federal jurisdiction bears the burden of establishing these elements.”). Plaintiffs must
 15 demonstrate standing for each claim and for each form of relief they seek. *TransUnion*
 16 *LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Article III standing is an indiscernible part of
 17 a plaintiff’s case and “must be supported at each stage of litigation in the same manner as
 18 any other essential element of the case. *Cent. Delta Water Agency v. United States*, 306
 19 F.3d 938, 947 (9th Cir. 2002). At the summary judgment stage, a plaintiff “need only
 20 establish a genuine dispute as to these requirements to survive summary judgment.”
 21 *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020); *see also Cent. Delta Water*
 22 *Agency*, 306 F.3d at 947 (“plaintiffs need not establish that they in fact have standing, but
 23 only that there is a genuine question of material fact as to the standing elements.”). When
 24 the material factual disputes underlying the standing issue are intertwined with an element
 25 of the merits of the claim, the court must leave the resolution to the trier of fact. *Bowen v.*
 26 *Energizer Holdings, Inc.*, 118 F.4th 1134, 1144–45 (9th Cir. 2024).

27 Global Guru broadly argues that Xfinity lacks standing to bring its claims but does
 28 not fashion any particular arguments to a specific claim. (Doc. 210 at 5–7.) Xfinity

1 contends that it has a legally protectable interest in its trademark rights, contractual
 2 relationships with current and prospective customers, and contractual and financial rights
 3 to the financed Xfinity phones. (Doc. 224 at 3–4.) Xfinity further contends that Global
 4 Guru’s buying and selling scheme caused the injuries to its protectable interests and
 5 injunctive relief or damages will redress the injuries. (*Id.*) Xfinity also identifies its claims
 6 under the standing standard. (*Id.* at 6–16 nn.5–9.)

7 Global Guru has failed to carry its initial burden to raise the standing issue on most
 8 of the claims. Rule 56 states:

9 A party may move for summary judgment, identifying each claim or
 10 defense—or the part of each claim or defense—on which summary judgment
 11 is sought. The court shall grant summary judgment if the movant shows that
 there is no genuine dispute as to any material fact and the movant is entitled
 to judgment as a matter of law.

12 Fed. R. Civ. P. 56(a). “[A] party seeking summary judgment always bears the initial
 13 responsibility of informing the district court of the basis for its motion, and identifying
 14 those portions of ‘the [record],’ which it believes demonstrate the absence of a genuine
 15 issue of material fact.” *Celotex*, 477 U.S. at 323. Global Guru has failed to identify each
 16 relevant claim and the elements of standing that are purportedly lacking. And, in reply to
 17 Xfinity identifying the relevant elements of standing for its claims, Global Guru made zero
 18 effort to address standing for most of the claims except for unjust enrichment, trafficking
 19 in computer passwords, unauthorized access, and unauthorized access with intent to
 20 defraud claims. Therefore, Guru has failed to establish that it is entitled to judgment as a
 21 matter of law on whether Xfinity has standing to bring the claims for unfair competition,
 22 trademark infringement, common law trademark infringement, tortious interference with
 23 business relationships and contractual relations, and common law fraud and
 24 misrepresentation. The Court will evaluate standing for the remaining claims.

25 1. Unjust Enrichment

26 Global Guru asserts a theory that Xfinity does not retain title to the phones, and
 27 therefore lacks standing to assert a claim based on harms caused by third parties. (Doc.
 28 241 at 7–8; *see also* Doc. 210 at 5–7.) Global Guru also argues that Xfinity has failed to

1 demonstrate a causal connection between the harm it has suffered, third parties stealing
 2 phones, and the benefit purportedly conferred by Xfinity on Global Guru. (Doc. 241
 3 at 7–8.) Xfinity alleges that it has standing because it was injured when: (1) customers
 4 breach their finance and service contracts under which money is owed or when devices are
 5 stolen; (2) the breach and injury are directly and inversely related to Global Guru’s profits
 6 derived from the business of buying phones at a discount that are under contract or obtained
 7 through fraud; and (3) repayment of the profits will remove the improper benefit Global
 8 Guru received. (Doc. 224 at 11 n.7.)

9 Global Guru oversimplifies Xfinity’s theory and errs by focusing on the phones
 10 themselves and whether Xfinity retains title as the basis for Xfinity’s alleged harm under
 11 the claim. (See Doc. 241 at 7–8.) Unjust enrichment pertains to situations where “one
 12 party has and retains money or benefits that in justice and equity belong to another.”
 13 *Trustmark Ins. Co. v. Bank One, Ariz.*, 48 P.3d 485 (Ariz. Ct. App. 2002), *as corrected*
 14 (June 19, 2002). From what the Court can glean, the basis for Xfinity’s injury is the harm
 15 stemming from the unjust enrichment itself. See *Food & Drug Admin. v. All. for*
 16 *Hippocratic Med.*, 602 U.S. 367, 381 (2024) (noting an injury in fact includes monetary
 17 injuries); see also *Freeman v. Sorchych*, 245 P.3d 927, 938 (Ariz. Ct. App. 2011)
 18 (providing the elements of an unjust enrichment claim, which includes an enrichment to
 19 the defendant and a detriment to the plaintiff). Xfinity appears to contend that it provides
 20 phones at a discounted price, including through applying credits to the customer’s accounts
 21 to provide the discount over the term of the agreement, which in turn entices the customer
 22 to enter and maintain a monthly service agreement that is paid throughout the term of the
 23 installment contract. For example, as evidence related to its trademark claims, Xfinity
 24 produced evidence that a customer had obtained a phone for “\$0 via 24 months of credits”
 25 and wanted to keep the line open to continue receiving the credits. (Doc. 206-2 at 2; see
 26 also 205-3 ¶ 7 (explaining Xfinity subsidizes phones for twenty-four months and recoups
 27 the value of the phone through financing payments or monthly service fees); Doc. 226-3
 28 at 15 (noting device credits spread out as monthly credits on the customer’s bill over the

term of the agreement).) A customer utilizing this scheme can then turn around and sell that device to Global Guru, which buys the device at a discount compared to the price it would have paid to Xfinity for the phone and had the promotional discounts not applied. Global Guru then earns a profit after selling the devices at a slightly marked-up price. On the other side, Xfinity could have sold the phone at full price had it known the customer or fraudster did not intend to use the phone on the service line. Whether Xfinity has a claim against the customer or a fraudster for the value of the device sold, when the purpose of the promotional discount was to secure that service line, is a separate issue from the harm alleged here. At bottom, Xfinity's theory relates to the benefit Global Guru receives—the profits—brought about by Xfinity's detriment—providing a phone to a customer for a reduced cost, or no cost at all, to facilitate bringing the customer under a service agreement when Xfinity could have retained the device and sold it at the full price.

There is no dispute that the customer's agreements prohibit reselling financed devices. (Doc. 205 ¶ 27; Doc. 230 ¶ 37.) There is also no dispute that Global Guru utilized search engine optimization to target sellers who were searching to sell financed or blocklisted devices. (See Doc. 205 ¶¶ 34, 41; Doc. 230 ¶¶ 46, 54; *see also* Doc. 206-6 at 2–3.) And at least some of the phones that Global Guru has purchased and sold include phones that were financed, blocklisted, or obtained through fraud. (See Doc. 205 ¶ 40; Doc. 230 ¶ 53; *see also* Doc. 205-3 at 39, 40; Doc. 230-1 at 4; Doc. 230-12 at 15.) Global Guru does not dispute that it earns a profit from these sales. (See Doc. 205 ¶¶ 50–51; Doc. 230 ¶¶ 67–68.) Xfinity has provided a declaration attesting to the fact that provides the financial incentives through financed phones to promote customer retention and further profits from mobile service contracts. (Doc. 205-3 ¶¶ 7–11.) Additionally, when bad actors or fraudsters obtain the phones, Xfinity refunds the defrauded customer and absorbs the costs and loses revenue under the finance and service agreements. (*Id.*); *Lujan*, 504 U.S. at 651 (noting that in response to a summary judgment motion, a plaintiff must set forth specific facts by affidavit or other evidence, which for purposes of the motion are taken as true, and at the final stage, those facts must be supported by adequate evidence at

1 trial).

2 Under these facts and Xfinity's theory of harm, the injury relating to Global Guru's
3 profit from the sale of financed and fraudulently obtained phones at Xfinity's expense from
4 absorbing associated costs and lost revenues is fairly traceable to the sale that effectuates
5 the harm. Global Guru does not dispute the third element, and the Court finds no reason
6 to question that relinquishment of such profits would not redress the injury to Xfinity.
7 Therefore, the Court finds Xfinity has carried its burden of establishing specific facts
8 supporting the elements of standing to bring the unjust enrichment claim.

9 2. Trafficking in Computer Passwords & Unauthorized Access Claims

10 Global Guru contends that Xfinity lacks standing to bring the trafficking in
11 computer passwords, 18 U.S.C. § 1030(a)(6), unauthorized access, *id.* § 1030(a)(5)(C), and
12 unauthorized access with intent to defraud, *id.* § 1030(a)(4), claims because Xfinity no
13 longer owns the phones and there is only liability where Global Guru knowingly accesses
14 a computer without or exceeding authorization. (Doc. 241 at 11.) Xfinity argues that it
15 has standing because (1) it is injured by the trafficking of information that enables
16 unauthorized access to its network that creates security vulnerabilities and dilutes the value
17 of access for actual customers creating a competitive disadvantage; (2) Global Guru's
18 practice of obtaining unauthorized access devices and selling them causes the security and
19 commercial disadvantages; and (3) the Computer Fraud and Abuse Act ("CFAA") is
20 specifically tailored to provide redress. (Doc. 224 at 16 n.9.)

21 Global Guru provides negligible analysis and reasoning on this issue. Once again
22 it harps on the ownership of the device at the time of sale but overlooks the harm that is
23 the basis for the claim. The injury is the harms resulting from Global Guru accessing the
24 Xfinity Mobile Network via the devices to unlock them. Although the Court doubts Global
25 Guru carried its initial burden, Xfinity has provided a declaration that establishes the
26 devices provide access to its network, which other computers administer. (Doc. 229-5
27 ¶¶ 5-6.) Xfinity also provided another declaration indicating losses it incurred from hiring
28 an investigator in responding to the alleged offense. (*See* Doc. 224 at 17-18 n.10; Doc.

232-2 ¶¶ 3–4; *see also* Doc. 205-7 ¶ 2.) Notably, however, it is unclear what exactly that investigation revealed. But assuming Global Guru carried its initial burden, and in taking the declaration as true and viewing the facts in Xfinity’s favor, so too has Xfinity. Xfinity has provided unrefuted evidence that Global Guru has accessed its network to unlock the carrier, and Xfinity has incurred monetary costs in investigating the issue that is redressable with economic damages. Therefore, the Court finds that Xfinity has carried its burden to establish facts that support standing to assert these claims.

B. Unfair Competition, Trademark Infringement, & False Association Claims

Both parties move for summary judgment on these three claims. (Doc. 210 at 7–12; Doc. 220 at 5–9.) The Lanham Act creates a federal cause of action for trademark infringement. *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 147 (2023). For the typical case for infringement of a registered mark, 15 U.S.C. § 1114(a)(1) imposes liability on a defendant in relevant part where it uses a registered mark in commerce in connection with the sale or advertisement of any services or in connection with such use that is likely to cause confusion, mistake, or to deceive. For unregistered marks, 15 U.S.C. § 1125(a) provides for a false association claim that imposes liability on a defendant in relevant part where it uses any name, term, or symbol in connection with any goods or services that is likely to cause confusion, mistake, or to deceive as to the affiliation, connection, or association of the defendant with another person or as to the origin, sponsorship, or approval of its goods, services, or commercial activities by another person. 15 U.S.C. § 1125(a)(1)(A); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014). For both claims, courts apply a likelihood-of-confusion test that asks whether a “reasonably prudent customer” in the marketplace is likely to be confused as to the origin of the services used in connection with the mark. *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015) (citation omitted) (noting the confusion “must be probable, not simply a possibility” (citation omitted)). The test generally does not require a plaintiff to prove instances of actual confusion. *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1050 (9th Cir. 1999).

Under Arizona law, the common law theory of unfair competition encompasses several tort theories including trademark infringement, false advertisement, “palming off,” and misappropriation. *Fairway Constructors, Inc. v. Ahem*, 970 P.2d 954, 956 (Ariz. Ct. App. 1998).⁷ The gravamen of an unfair competition claim is confusion to the public. *Taylor v. Quebedeaux*, 617 P.2d 23, 25 (1980). Arizona’s standard overlaps with the federal trademark likelihood-of-confusion test, which leads courts to combine the analysis and consider them together. *Health Indus. Bus. Commc’ns Council Inc. v. Animal Health Inst.*, 481 F. Supp. 3d 941, 956 (D. Ariz. 2020) (noting the claims are “substantially congruent”).

Global Guru argues that there is no evidence to support the allegation that it uses the mark in the selling side of its business, its use is permissible under the nominative fair use doctrine, it does not target Xfinity phone owners with its marketing or advertisements, and there is no evidence to support that customers confuse its services with Xfinity’s. (Doc. 210 at 8–12.) According to Global Guru, its online marketing channels to buy devices are distinct and separate from Xfinity’s online marketing channels to sell the devices. (Doc. 228 at 5–6.) Global Guru also broadly posits that there is no basis for liability under 15 U.S.C. § 1114(1)(a) for using a trademark in the process of buying goods rather than selling goods. (Doc. 210 at 8–12.)

Xfinity argues that under the factors enumerated in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979), Global Guru’s use of the mark creates a likelihood of confusion about the affiliation between the parties and there is evidence of Global Guru using the mark to advertise and market its services. (Doc. 220 at 5–9; Doc. 224 at 6–9.)⁸

⁷ Xfinity’s Complaint does not clarify the law that its unfair competition claim arises under, but its briefing cites cases addressing Arizona common law, so the Court construes the claim accordingly. (Doc. 142 ¶¶ 161–64; Doc. 220 at 5 (citing *Doe v. Ariz. Hosp. & Healthcare Ass’n*, No. CV 07-1292-PHX-SRB, 2009 WL 1423378, at *11 (D. Ariz. Mar. 19, 2009)).)

⁸ Xfinity also argues that based on this Court’s prior Order granting it leave to amend its Complaint, the nominative fair use defense is unavailable. (Doc. 220 at 5–9 (citing Doc. 131).) To clarify, the Court’s statement was in the context of whether the nominative fair use defense would render leave to amend futile based on Xfinity’s arguments that Global Guru used more of the mark than necessary, not that it was barred all together or that Xfinity was alleviated of its burden of proof as the litigation progressed. (Doc. 131 at 7–9.) In attempting to address this Court’s other Order dismissing the claims based on the

1 Xfinity disagrees that there is no liability for using the mark to buy devices and that the
 2 parties' marketing channels are distinct because Xfinity also offers money to customers
 3 that trade-in their old devices when purchasing new ones. (Doc. 220 at 5–9; Doc. 236
 4 at 2–3; *see also* Doc. 234-1 at 2–7.)

5 The Court begins with the issue surrounding the nominative use defense. The
 6 defense “protects a defendant ‘where the use of the trademark does not attempt to capitalize
 7 on consumer confusion or to appropriate the cachet of one product for a different one.’”
 8 *Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir. 2015) (quoting *New Kids on*
 9 *the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 306–08 (9th Cir. 1992)). A defendant
 10 seeking to invoke the defense “need only show that it used the mark to refer to the
 11 trademarked good.” *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1183 (9th
 12 Cir. 2010). Global Guru’s use of the mark undoubtably refers to devices on the Xfinity
 13 network, not Global Guru’s goods, and the ultimate concern is whether that use causes
 14 confusion over whether Xfinity has endorsed or sponsored Global Guru’s venture of
 15 buying devices affiliated with the Xfinity brand. *See Adobe Systems*, 809 F.3d at 1081. To
 16 that end, the test in *Toyota Motor Sales* replaces the *Sleekcraft* test to measure likelihood
 17 of customer confusion. *Id.*

18 The *Toyota* test asks whether (1) the product was readily identifiable without use of
 19 the mark; (2) defendant used more of the mark than reasonably necessary; or (3) defendant
 20 falsely suggested he was sponsored or endorsed by the trademark holder. 610 F.3d
 21 at 1175–76 (“The third factor speaks directly to the risk of such confusion, and the others
 22 do so indirectly.”). If the answers to all three are negative, then there is no infringement.
 23 *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 893 (9th Cir. 2019); *but see*
 24 *Toyota Motor Sales*, 610 F.3d at 1176 (noting that if the factors are not met, the Court may
 25 order defendants to modify their use to satisfy all three). The plaintiff always carries the
 26 burden of proving likelihood of confusion and must establish that the defendant’s use of
 27 the mark was not nominative fair use. *Toyota Motor Sales*, 610 F.3d at 1182–83 (“A
 28 nominative fair use defense, (*see* Doc. 77 at 4–7), the Court seemingly added to the
 confusion. The Court’s analysis in this Order will seek to dispel any confusion.

1 finding of nominative fair use is a finding that the plaintiff has failed to show a likelihood
2 of confusion as to sponsorship or endorsement.”).⁹

3 Xfinity has not argued that any of its devices are identifiable by means other than
4 referring to the Xfinity name itself without venturing into absurd descriptive phrases. *See,*
5 *e.g., Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 802 (9th Cir. 2002) (agreeing under the
6 first prong of the test that there was no practical way for the defendant to identify her title
7 as “Playboy Playmate of the Year 1981” without venturing into absurd descriptive phrases
8 in avoidance of using the trademarked title). Global Guru certainly uses the mark to
9 identify the carrier of a device for purposes of categorizing the phones to make an offer to
10 the customer. Therefore, Xfinity fails to carry its burden to refute that Global Guru’s use
11 meets the first factor.

12 Xfinity has maintained that Global Guru could have used only words in a list rather
13 than the stylized mark to identify the carriers. Under the second factor, the Ninth Circuit
14 has noted that “[c]onsumers may reasonably infer sponsorship or endorsement if a
15 company uses . . . ‘more’ of a mark than necessary.” *Toyota Motor Sales*, 610 F.3d
16 at 1176. And further, that the factor implicates the nature of the defendant’s use. *Applied*
17 *Underwriters*, 913 F.3d at 895. This Court, in applying the *Toyota* test, has found that
18 using a stylized logo or distinctive lettering is not automatically dispositive. *See Aviva*
19 *USA Corp. v. Vazirani*, 902 F. Supp. 2d 1246, 1264–65 (D. Ariz. 2012) (finding the
20 defendant’s use of a mark met the second factor despite using the stylized logo and
21 distinctive coloring because the defendant used the mark to criticize the trademark holder,
22 cutting against the inference of sponsorship or endorsement), *aff’d*, 632 F. App’x 885 (9th
23 Cir. 2015). While the criticism in *Aviva* is factually distinct, the inquiry remains on whether
24 the nature of Global Guru’s use “inspire[s] a mistaken belief on the part of consumers that
25 the speaker is sponsored or endorsed by the trademark holder.” *Id.* at 1265 (quoting *Toyota*
26 *Motor Sales*, 610 F.3d at 1176).

27
28 ⁹ Given Xfinity’s reliance on the Court’s previous Order it argued likelihood of confusion
under the *Sleekcraft* factors, the Court will construe its arguments and allegations under
the appropriate framework.

1 While the second factor is a close call, the evidence demonstrates that the nature of
2 Global Guru's use of the stylized mark is not to attract customers in an advertising or
3 marketing sense. *Cf. Toyota Motor Sales*, 610 F.3d at 1175, 1178–81 (taking issue with
4 the auto-broker that used Lexus' stylized logo, "Lexus" in its domain names, photographs
5 of Lexus vehicles on its website, and that specialized in and encouraged purchases of Lexus
6 vehicles over other manufacturers). Customers may reach SellLocked.com—an
7 unaffiliated domain name—through Global Guru's keyword search optimization, but the
8 customer does not actually see the stylized mark until he or she engages in the click-through
9 process to receive an offer for the value of the phone. Even then, the stylized mark is
10 juxtaposed among various carriers without any indicia of favoritism for Xfinity devices.
11 To assume use of the mark suggests sponsorship or endorsement from Xfinity would
12 require the same to be true for each individual carrier for which Global Guru has copied
13 their marks. *See id.* at 1176 (explaining that the test is ultimately "designed to address the
14 risk that nominative use of the mark will inspire a mistaken belief on the part of consumers
15 that the speaker is sponsored or endorsed by the trademark holder").

16 Xfinity's proffered evidence of actual confusion consists of a declaration from one
17 of its representatives and an inquiry from the customers that received a phone for \$0
18 discussed previously. (Doc. 205 ¶ 20.) The declaration provides that Xfinity has received
19 complaints from customers and prospective customers about purchases made from
20 companies, like Global Guru, and expressed general confusion about whether the
21 companies are affiliated. (Doc. 205-3 ¶ 15.) It is not clear if these vague complaints relate
22 to particular Global Guru customers, rather than similar companies generally, and it is
23 further unclear if that confusion is attributable to use of the trademark in any way. The
24 declaration, on its own, does not establish a genuine dispute about whether Global Guru's
25 use of the mark is likely to cause confusion.

26 The customer's inquiry relates to a question about whether Global Guru would
27 notify Xfinity if the phone was accepted because the customer purchased the phone for "\$0
28 via 24 months of credits" and wanted to keep the line open to continue receiving the credits.

1 Viewed in context, the customer appears to have sought to confirm that Global Guru was
2 in fact not affiliated with Xfinity to ensure that he continued to receive the credits from
3 Xfinity because, as it is undisputed and reasonable to assume, resale of the device in the
4 secondary-market would have violated the customer's financing agreement with Xfinity.
5 That's not customer confusion, that's customer avoidance.¹⁰ This evidence does not
6 substantiate the declaration, and it does not show any confusion attributable to the customer
7 viewing the stylized mark.

8 Viewed even in Xfinity's favor, any inference from the evidence leads to
9 unwarranted and unembellished speculation that customer confusion is merely possible,
10 but not likely. *See Lakeside–Scott v. Multnomah County*, 556 F.3d 797, 802–03 (9th Cir.
11 2009) (noting courts need not draw inferences based solely on speculation). Despite the
12 Court previously finding that nominative fair use was not available to render leave to
13 amend the claims futile, (*see* Doc. 131 at 9), at this stage, Xfinity has failed to carry its
14 burden in establishing evidence that use of the mark causes a likelihood of confusion. *See*
15 *Toyota Motor Sales*, 610 F.3d at 1182. For the same reasons as the second factor, the Court
16 finds under the third factor and there is no basis to find Global Guru's use of the mark
17 suggested Xfinity's sponsorship or endorsement. *See Applied Underwriters*, 913 F.3d at
18 893. Accordingly, nominative fair use applies, precluding Global Guru's liability for
19 infringement and false association. *See Toyota Motor Sales*, 610 F.3d at 1183 n.11
20 (“Nominative fair use . . . represents a finding of no liability.”). Additionally, because
21 nominative fair use “does not implicate the source-identification function that is the
22 purpose of trademark, it does not constitute unfair competition,” and Xfinity's unfair
23 competition claim fails. *New Kids on the Block*, 971 F.2d at 308; *see also Health Industry*
24 *Business Communications Council*, 481 F. Supp. at 956 (noting that unfair competition
25 claims under state law are essentially the same as those under the Lanham Act and share

26 ¹⁰ Xfinity raised additional arguments of dilution and reputational harm. Xfinity, however,
27 did not raise separate claim for trademark dilution. *See* 15 U.S.C. § 1125(c)(1). The
28 Lanham Act does not require a plaintiff to establish a likelihood of confusion for a
trademark dilution claim. *See Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir.
2008). Whether there is dilution in this case is not squarely before the Court and customer
confusion is not relevant to that analysis to inform the Court's inquiry.

1 the same analysis). The Court will grant summary judgment in Global Guru’s favor, deny
2 summary judgment for Xfinity, and dismiss the claims.

3 **C. Tortious Interference**

4 Both parties move for summary judgment on the tortious interference claims.
5 Tortious interference requires a plaintiff to establish: “the existence of a valid contractual
6 relationship or business expectancy; the interferer’s knowledge of the relationship or
7 expectancy; intentional interference inducing or causing a breach or termination of the
8 relationship or expectancy; and resultant damage to the party whose relationship or
9 expectancy has been disrupted.” *Dube v. Likins*, 167 P.3d 93, 98 (Ariz. Ct. App. 2007)
10 (citation omitted).

11 The crux of the parties’ dispute is whether Xfinity has shown that the customers
12 who sold phones to Global Guru were also Xfinity customers, as opposed to third-party
13 sellers, and even if the sellers were Xfinity customers, whether Xfinity has established a
14 valid contractual relationship exists. (*See, e.g.*, Doc. 228 at 6.) Xfinity’s claims blur the
15 distinction between claims for the tort of intentional interference with contract and tortious
16 interference with contractual relations or with business expectancies. (*See* Doc. 143
17 at 22–25.) The parties have not provided the Court with any case law that clarifies if
18 evidence of an actual contract with a particular customer is required. Xfinity did not
19 present evidence relating to specific customer’s agreements, and instead analyzes its claims
20 based on the Terms and Conditions generally as evidence for an apparent class or classes
21 of customers—those with financing agreements or service agreements, or both. (*See* Doc.
22 224 at 9–10.)

23 “[T]ortious interference with a business expectancy covers situations that the tort of
24 intentional interference with a contract does not, the former has only been available in those
25 situations where the plaintiff can identify the specific relationship with which the defendant
26 interfered.” *Dube*, 167 F.3d at 101 (requiring obstruction to “some precise business
27 expectancy or contractual relationship” (citation omitted)). Xfinity has not attempted to
28 identify any specific customer contract that Global Guru interfered with to support a claim

1 based on the tort of intentional interference with contract and has not provided the Court
2 with any authority to support this type of claim without showing the contract exists. *Cf.*
3 *Pasco Indus., Inc. v. Talco Recycling, Inc.*, 985 P.2d 535, 547 (Ariz. Ct. App. 1998)
4 (finding a claim for tortious interference with contract requires establishing that there is a
5 contract between the plaintiff and a third party); *True Freight Logistics LLC v. Glob. Tranz*
6 *Enters. Inc.*, No. CV-18-01472-PHX-JGZ, 2019 WL 11840292, at *4 n.4 (D. Ariz. Jan. 11,
7 2019) (“[A] claim of tortious interference with contract requires the existence of a contract
8 between the plaintiff and a third party.”). Therefore, assuming Xfinity intended for its
9 tortious interference claim to cover interference with contract, as opposed to interference
10 with contractual relations or business expectancies, the claim fails.

11 Regarding Xfinity’s tortious interference with contractual relationships or business
12 expectancies claims, courts permit a plaintiff to allege an expectancy against a class of
13 individuals but only where the group is specifically identifiable. *Dube*, 167 P.3d at 101
14 (relating pleading requirements); *Edwards v. Anaconda Co.*, 565 P.2d 190, 192 (Ariz. Ct.
15 App. 1977). Xfinity has identified the classes of customers as those under installment
16 contracts or service agreements or both. (Doc. 236 at 4.) This may be sufficient for
17 pleading a claim, but at this stage Xfinity must show evidence of an “actual and identifiable
18 understanding or agreement that in all probability would have been completed without the
19 defendant’s interference.” *Id.* at 101; *Tresona Multimedia LLC v. Legg*, No.
20 CV-14-02141-PHX-DGC, 2015 WL 470228, at *10 (D. Ariz. Feb. 4, 2015).

21 Xfinity’s expectancy is that the customers will continue follow through on payments
22 under the installment contracts and remain as service subscribers during the term of the
23 installment contracts. (See Doc. 236 at 4.) Xfinity has provided no evidence that any
24 customer failed to meet its business expectancies. Xfinity points to the same customer that
25 the Court addressed previously who had inquired about selling his Xfinity device that was
26 under an installment plan but sought to keep his line open. (See *id.*) There is no evidence
27 to suggest that this customer did not continue to pay for his service line through the
28 remainder of the term, thus Xfinity failed to establish is suffered damages from an

1 interference with this customer. Xfinity also points to evidence of an individual selling a
 2 device to Global Guru and stating that she will likely not make payments on the phone.
 3 (See Doc. 226 ¶ 14.) This evidence may go to Global Guru’s knowledge of the business
 4 relationships or expectancies, but the evidence does not show the individual is an Xfinity
 5 customer, nor that she failed to pay an installment related to the device or the wireless
 6 service. (See Doc. 231-5 at 54; Doc. 232-4 at 55.) This evidence would require the Court
 7 to speculate that the individual is actually an Xfinity customer and that even after selling
 8 the phone to Global Guru, she was unable make payments.

9 Global Guru notes that the record identifies over 500 phones that it had purchased
 10 from unidentified parties but argues that Xfinity has not tied any of these transactions to a
 11 particular customer or relationship. (See Doc. 241 at 5.) Rather than tie any of those
 12 phones to a failure to pay on the contracts or expected service agreements related to those
 13 phones, i.e., connect the dots between a relationship or expectancy, the interference, and
 14 resulting damages relating to that relationship or expectancy, Xfinity opted for
 15 generalizations and speculation to argue its evidence support its claims. Its evidence is
 16 unavailing and highlights further gaps in Xfinity’s evidence overall. Therefore, Xfinity
 17 has failed to establish a genuine dispute of fact to sustain its claims for tortious interface
 18 with contract, contractual relations or business expectancies. The Court will grant
 19 summary judgment in Global Guru’s favor a dismiss the claims.

20 **D. Unjust Enrichment**

21 A claim for unjust enrichment requires a plaintiff to show: “(1) an enrichment, (2)
 22 an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the
 23 absence of justification for the enrichment and impoverishment, and (5) the absence of a
 24 remedy at law.” *Span v. Maricopa Cnty. Treasurer*, 437 P.3d 881, 886 (Ariz. Ct. App.
 25 2019); *Freeman v. Sorchych*, 245 P.3d 927, 936 (Ariz. Ct. App. 2011) (“[A] plaintiff must
 26 demonstrate that the defendant received a benefit, that by receipt of that benefit the
 27 defendant was unjustly enriched at the plaintiff’s expense, and that the circumstances were
 28 such that in good conscience the defendant should provide compensation.”). A “party may

1 be liable to make restitution for benefits received, even though he has committed no tort
2 and is not contractually obligated to the plaintiff.” *A Flooring Sys., Inc. v. Radisson Grp.,*
3 *Inc.*, 772 P.2d 578, 581 (Ariz. 1989); *see also Baughman v. Roadrunner Commc ’ns, LLC*,
4 No. CV-12-565-PHX-SMM, 2014 WL 3955262, at *4 (D. Ariz. Aug. 13, 2014) (“[T]he
5 essence of an unjust enrichment claim is that there is no direct relationship between the
6 parties under which the plaintiff may recover.”).

7 The parties generally dispute whether Xfinity must directly confer the benefit to
8 Global Guru so that there are no steps in between the benefit received and the detriment.
9 (See Doc. 236 at 9; Doc. 241 at 8.) The parties have not provided, nor has the Court located,
10 any cases directly on point for the circumstances of this case. As a general matter, “[a]
11 person who has conferred a benefit upon another as the performance of a contract with a
12 third person is not entitled to restitution from the other merely because of the failure of
13 performance by the third person.” *Advance Leasing & Crane Co. v. Del E. Webb Corp.*,
14 573 P.2d 525, 452–53 (Ariz. Ct. App. 1977) (quoting and relying on Restatement (First) of
15 Restitution § 110 (1937)). As a general proposition that may be true, however, the
16 Restatement, which Arizona courts follow absent contrary Arizona law, *see id.*, also
17 recognizes that “[a] person who has entered into a transaction with another under such
18 circumstances that, because of a mistake, he would be entitled to restitution from the other,
19 is entitled to restitution from a third person who had notice of the circumstances before
20 giving value.” Restatement (First) of Restitution § 13 (1937). The Court disagrees with
21 Global Guru that by receiving a benefit from a third party, that fact necessarily means that
22 Xfinity did not confer a benefit on Global Guru. *See Span*, 437 P.3d at 887 (“unjust
23 enrichment requires consideration of the overall context of the transaction.”).

24 The issue here, of course, is the evidence underlying the transactions. Again, like
25 the tortious interference claims, Xfinity has failed to establish that any benefit Global Guru
26 received from a particular financed device corresponds to a detriment suffered from a
27 failure to pay an installment contract on that device. This point addresses those phones
28 that customers financed, not those obtained by unidentified fraudsters. To show a

1 connection, Xfinity could have established that the customer obtained the device with no
 2 intent to pay, sold the device to Global Guru, in which it then sold for profit, and the
 3 customer failed to pay on its agreements or maintain a service line. From what the Court
 4 can identify, there are only two transactions remotely close to this scenario. The Court
 5 previously addressed the customer who obtained a phone for \$0 with credits applied to his
 6 account, but that does not evince a failure to pay on any obligations causing a detriment to
 7 Xfinity. The other transaction relates to the seller indicating that she would not be able to
 8 make payments on the device, so it would soon be blocklisted. (*See* Doc. 226 ¶ 14.)
 9 Notably, however, there is no evidence that she financed the phone through Xfinity, as
 10 opposed to through a manufacturer, e.g., Apple, or retailer, e.g., BestBuy. This evidence
 11 is insufficient to reasonably infer that she not only failed to pay, assuming she did not use
 12 the payment from Global Guru to cover her obligation, but also that she owed any unpaid
 13 amount to Xfinity. Therefore, the Court finds that Xfinity relies on insufficient evidence
 14 and speculation to sustain its unjust enrichment claim relating to financed phones.

15 Regarding fraudulently obtained phones, Xfinity has also presented some evidence
 16 of Global Guru's profiteering efforts. Xfinity has presented a declaration and a list of
 17 devices supporting that Global Guru offered to sell devices were fraudulently obtained or
 18 stolen by unidentified parties and resulted in a total loss. (*See* Doc. 226-3 at 6–7, 39–47.)
 19 Global Guru only disputes whether number of phones is accurate. (*See* Doc. 205
 20 ¶ 40(a)(iii), (b); Doc. 230 ¶¶ 12, 53.)¹¹ It is not clear that the individual selling the device
 21 is the party responsible for fraudulently obtaining the device. Xfinity, however, has
 22 provided a list tracking the IMEI numbers of at last some of these devices, the price Global
 23 Guru paid, and the corresponding selling price. (*See* Doc. 210-3 at 1–12.) From these
 24 figures, Global Guru's benefit is ascertainable by deriving its profit from selling
 25 fraudulently obtained devices. *See Pyeatte v. Pyeatte*, 661 P.2d 196, 202 (Ariz. Ct. App.
 26 1982) ("A benefit may be any type of advantage, including that which saves the recipient

27
 28 ¹¹ On that point, Global Guru's narrow dispute does not raise a genuine dispute of fact. Mr. Zahara ran the IMEIs through a third-party website and admits that he did not have access to the actual blocklist. (Doc. 230-1 ¶¶ 35–38.)

1 from any loss or expense.”). Likewise, Xfinity can show a detriment connected to the sale
2 because it absorbed the loss on the device after it expected to recoup the costs through
3 installment payments or service agreements.

4 The only remaining issues with respect to fraudulently obtained devices that are
5 then sold to and then resold by Global Guru is whether it lacks a justification and whether
6 Xfinity lacks a remedy at law. There is no dispute that Xfinity lacks a remedy at law. The
7 Court need not determine that Global Guru intended to compensate Xfinity for the benefit
8 it derived or that Xfinity intended for Global Guru to make the compensation.
9 *Murdock-Bryant Const., Inc. v. Pearson*, 703 P.2d 1197, 1203 (Ariz. 1985) (explaining that
10 unjust enrichment is an obligation implied in law without reference to the parties’
11 intentions); *see also Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 283 P.3d 45, 50–51 (Ariz.
12 Ct. App. 2012) (noting “unjust enrichment should not be used to saddle entities with
13 expenses they chose not to incur” but may involve liability based on improper conduct).

14 To justify its purchases, sales, and resulting profits, Global Guru advances that it
15 paid fair value in arms-length transactions for the devices and receives no discount over
16 the fair value of the devices. (Doc. 210 at 15; Doc. 228 at 16.) Apparently, Global Guru’s
17 position is that a device’s baggage has no bearing on the price it pays or for which it sells
18 the device, rather the condition and functionality guides the price. (Doc. 228 at 16.) In
19 turn, Xfinity argues the evidence shows that Global Guru purchased brand new, sealed
20 devices for substantially less than the fair market value reflecting the retail price of brand
21 new, sealed devices and profited from that discount. (Doc. 236 at 11.) Of note, by using
22 the retail price, Xfinity’s ultimate calculation for enrichment is disconnected from the
23 fundamental economic reality that most goods sold in a secondary market are purchased
24 for less than price a person would pay at a retailer for the same good. While Xfinity has
25 not shown that Global Guru profited from illicit devices over the amount it would have
26 from a similar non-illicit device, Global Guru’s argument calls for a hypothetical
27 distinction that may not make a material difference. A reasonably jury could find that the
28 mere possibility that Global Guru could have profited from a different device does not

1 absolve it from selling the illicit device absent additional circumstances or justifications.

2 Looking at the circumstances surrounding the transactions, and as Xfinity contends,
3 Global Guru created the marketplace and solicited the sales of Xfinity phones, including
4 blocklisted devices. (Doc. 224 at 12; Doc. 236 at 9, 10 n.4.) There is no genuine dispute
5 that Global Guru utilized search engine optimization based on keywords involving
6 financed and blocklisted devices to drive customers its website. Xfinity has indicated that
7 it plans to offer testimony from its Director of Compliance regarding the specific
8 fraudulently obtained devices that he identified in Global Guru's inventory that it later
9 resold. (Doc. 226 at 17–18 ¶ 28; *see also* Doc. 226-3 ¶¶ 1, 21–25.) Global Guru
10 acknowledges that there is a somewhat specialized market for blocklisted devices, which
11 other resellers avoid, and that the market comes with a risk of litigation by companies like
12 Xfinity. (Doc. 226-2 at 24.) Global Guru admits that it conveys to its customers that is
13 specializes in buying locked devices. (Doc. 230 ¶¶ 49–50.) It also admits that as the
14 quantity of devices a customer seeks to sell increases, so does the likelihood the seller does
15 not have a legitimate reason to possess them. (Doc. 230 ¶ 56.) While Global Guru checks
16 the devices for functionality, it claims that its due diligence is not related to whether a
17 device is blocklisted. (Doc. 230-1 at 1–2.) At the same time, however, Global Guru also
18 claims that its system flags customers selling ten or more devices or a certain total dollar
19 amount, inducing Global Guru to follow up with the customer and investigate the reasons
20 for the sale. (*See* Doc. 226-7 at 23–34; Doc. 205-2 at 13–17.) The evidence further shows
21 that Global Guru bought and sold multiple devices from single customers that were
22 blocklisted due to fraud and total losses to Xfinity. (Doc. 226 ¶ 21.)

23 Under these facts, there is a genuine dispute remains about whether there is an
24 absence of justification for Global Guru profiting from selling illicit devices. Global Guru
25 may not have participated in the fraudsters obtaining the devices in a tortious sense, *see A*
26 *Flooring System*, 772 P.2d at 581, but Global Guru targeted and specialized in locked
27 devices and willingly engaged in a grey market in which fraudsters have every incentive
28 to conceal the nature of their goods. There are sufficient facts for a reasonable jury to infer

1 that Global Guru bought these devices aware of and acquiesced in a known risk that the
 2 devices were the byproduct of fraud and profiteered anyway. Whether Global Guru is
 3 feigning ignorance or innocence, and therefore whether it unjustly enriched itself to
 4 Xfinity's detriment, is for a jury to decide.

5 Therefore, the Court will grant partial summary judgment for Global Guru relating
 6 to unjust enrichment claim based on transactions pertaining to financed phones absent
 7 fraud and deny summary judgment in all other respects for both parties.

8 **E. Fraudulent Misrepresentation**

9 Under Arizona law, a showing of fraudulent misrepresentation requires: (1) "a false
 10 material representation[,]" (2) "made with the speaker's knowledge of its falsity or
 11 ignorance of its truth and with the intent that it be acted upon by the listener"; (3) "the
 12 listener's ignorance of its falsity, reliance on its truth, and the right to rely on its truth"; and
 13 (4) "consequent and proximate injury." *Dillon v. Zeneca Corp.*, 42 P.3d 598, 603 (Ariz.
 14 Ct. App. 2002). A claim for fraud requires proof of nine elements by clear and convincing
 15 evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge
 16 of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the
 17 recipient in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity;
 18 (7) the hearer's reliance on its truth; (8) the hearer's right to rely on it; (9) the hearer's
 19 consequent and proximate injury. *Comerica Bank v. Mahmoodi*, 229 P.3d 1031, 1033–34
 20 (Ariz. Ct. App. 2010).

21 Global Guru argues that it is entitled to summary judgment because there is no
 22 evidence of any false representations to Xfinity. (Doc. 210 at 15–16.) Xfinity does not
 23 present any actual evidence of a false representation by any named Defendant, and instead
 24 relies on arguing there is sufficient circumstantial evidence showing that any one of the
 25 named Defendants incentivized repeat customers to make false statements to Xfinity to get
 26 the phones. (Doc. 224 at 14–15.) Xfinity relies general information about mysterious
 27 fraudsters who have allegedly impersonated real customers to order phones on their
 28 accounts, used fake identities to obtain the phones, or falsely indicated that they would

1 abide by Xfinity’s Terms and Conditions. (*Id.*) Any tortious misconduct relates to third
 2 parties not before the Court.

3 Xfinity has failed to point the Court to any specific evidence substantiating (1)
 4 whatever fraud Global Guru committed to obtain any of the phones in this case; (2) that
 5 any of the people who sold phones to Global Guru said anything about how they obtained
 6 the phones, (3) that any named Defendant directed any buyer to lie to Xfinity, to use a
 7 stolen identity, or otherwise fraudulently obtain the phones, or (4) any statements from
 8 customers that induced Xfinity to provide them with a phone that the customer then sold
 9 to Global Guru. While it is true that knowledge of the false representation may be inferred
 10 by circumstantial evidence, there must still be “some evidence on which that inference is
 11 based.” *Accord Trucking, Inc. v. FedEx Ground Package Sys., Inc.*, No. 1 CA-CV
 12 23-0710, 2024 WL 4602133, at *9 (Ariz. Ct. App. Oct. 29, 2024). Fraud requires more
 13 than “doubtful, vague, speculative, or inconclusive evidence.” *Id.* at *9 (quoting *Honk v*
 14 *Karlsoon*, 292 P.2d 455, 460 (Ariz. 1956)). Xfinity’s circumstantial evidence falls short.
 15 As the Court has explained, this is at best an issue of unjust enrichment, not common law
 16 fraud. Therefore, the Court will grant summary judgment for Global Guru on this claim.

17 **F. Trafficking in Computer Passwords & Unauthorized Access**

18 All three claims fall under 18 U.S.C. § 1030. The trafficking in computer passwords
 19 claim requires a plaintiff to establish that the defendant “knowingly and with the intent to
 20 defraud traffics . . . in any password or similar information through which a computer may
 21 be accessed without authorization.” 18 U.S.C. § 1030(a)(6). The unauthorized access
 22 claim requires establishing the defendant “intentionally access a protected computer
 23 without authorization, and as a result of such conduct, causes damage and loss.” *Id.*
 24 § 1030(a)(5)(C). And last, the unauthorized access with intent to defraud claims requires
 25 establishing the defendant “knowing and with the intent to defraud, accessed a protected
 26 computer without authorization, and by means of such conduct furthers the intended fraud
 27 and obtains anything of value.” 18 U.S.C. § 1030(a)(4).

28 Global Guru moves for summary judgment on all three claims, arguing the CFAA

1 concerns hacking, not the conduct at issue in this case, and that Xfinity has no evidence
2 that Global Guru knowingly trafficked in any computer passwords, nor any evidence that
3 they accessed any of Xfinity’s protected computers without authorization. (Doc. 210
4 at 16–17.) Xfinity claims that there is evidence that (1) Global Guru knowingly buys
5 blocklisted phones; (2) the customers selling the phones obtained them through fraud; (3)
6 Global Guru sells the phones in countries without the Xfinity network; (4) Global Guru
7 accessed the Xfinity network, which is connected to Xfinity’s computers, without
8 authorization by turning on the phones; (5) Global Guru would install and remove apps
9 from the phones before selling them; and (6) Global Guru hired an investigator to identify
10 and investigate the scheme. (Doc. 224 at 17–18; *see also* Doc. 226 at 18–19 ¶¶ 25–32.) In
11 reply, Global Guru maintains that there is no evidence to tie it to the unnamed fraudsters
12 and there is no evidence it manipulated the devices’ information to facilitate trafficking
13 them. (Doc. 241 at 10–11.)

14 All three claims involve a defendant alleged to have “access[ed]” a computer or
15 protected computer “without authorization” or traffic passwords or similar information
16 enabling such access without authorization. 18 U.S.C. § 1030(a)(4), (5)(C), (6). “In the
17 computing context, ‘access’ references the act of entering a computer ‘system itself’ or a
18 particular ‘part of a computer system,’ such as files, folders, or databases.” *Van Buren v.*
19 *United States*, 593 U.S. 374, 388 (2021). In Xfinity’s view, each phone contains
20 proprietary software that functions as a code that automatically enables the device to access
21 the Xfinity Mobile Network when turned on and only customers in good standing are
22 authorized to access the network. (Doc. 226 ¶¶ 40–42; Doc. 229-5 ¶¶ 5–6.) Assuming this
23 is sufficient to constitute access, the issue becomes whether access was “without
24 authorization” or if Global Guru trafficked information that enables access to the network
25 without authorization.

26 The CFAA is “concerned with hacking, which is why it also prohibits accessing a
27 computer ‘without authorization.’” *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012).
28 The term “authorization,” in this context, generally means “permission or power granted

1 by an authority.” *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009).
2 The Ninth Circuit has interpreted “without authorization” as occurring in situations where
3 “a person circumvents a computer’s generally applicable rules regarding access
4 permissions, such as username and password requirements, to gain access to a computer.”
5 *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1200–01 (9th Cir. 2022); *see also*
6 *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058 (9th Cir. 2016) (finding the
7 defendant arguably had permission to access Facebook’s computers because the
8 defendant’s users permitted it to access Facebook’s computers, reasoning it was akin to
9 allowing a friend use a computer or log into an email account). “[W]hen a computer
10 network generally permits public access to its data, a user accessing that publicly available
11 data will not constitute access without authorization under the CFAA.” *hiQ Labs*, 31 F.4th
12 at 1200–02; *see also Meta Platforms, Inc. v. BrandTotal Ltd.*, 605 F. Supp. 3d 1218, 1262
13 (N.D. Cal. 2022) (“[W]ithout authorization is predicated on the general public lacking
14 authorization to access the material at issue at all.”). The inquiry focuses on the computer
15 owner’s conduct, not the accessor’s state of mind. *AtPac, Inc. v. Aptitude Sols., Inc.*, 730
16 F. Supp. 2d 1174, 1180 (E.D. Cal. 2010).

17 Xfinity has conceivably permitted any one to access its network by virtue possessing
18 a phone and turning it on anyone capable of turning on an Xfinity-enabled device has
19 access to the network. This fact is fatal to Xfinity’s claims. Xfinity has not provided any
20 information about its security protocols, any authentication measures, or any requirements
21 imposed on a user powering on a device that constrain the public’s ability to access the
22 network. Turning the device on is a function of the device itself and independent from the
23 code enabling access to the network. In this regard, Xfinity has not put any constraints on
24 the mechanism by which the public accesses the network. Beyond turning the phone on,
25 Xfinity has provided no evidence or explanation about how Global Guru gains access to
26 the network. Turning the device on to delete applications from the device itself does not
27 necessarily implicate accessing Xfinity’s systems. Any inference from here would require
28 improper speculation. Therefore, the Court finds that Xfinity has not shown that Global

1 Guru accessed the network by means not available to the general public.

2 Xfinity has also failed to establish that Global Guru trafficked in information
3 covered by the CFAA. *See Van Buren*, 593 U.S. at 390 (“[Section 1030(a)(6)]
4 contemplates a ‘specific type of authorization—that is, authentication,’ which turns on
5 whether a user’s credentials allow him to proceed past a computer’s access gate.”).
6 Xfinity’s lone allegation pertaining to the information is that every time Global Guru sold
7 a phone, it transferred the code to the customer that allowed access to the network. (Doc.
8 226 ¶ 42.) This argument is seemingly incompatible with its main theory that Global Guru
9 traffics phones to international markets where the Xfinity Mobile Network does not
10 operate. But regardless, Xfinity has not shown that there are any authentication measures
11 beyond powering on the device—again, a function of the device independent of the
12 code—that effectuates accessing the network. Therefore, Xfinity has failed to create a
13 genuine dispute that Global Guru traffics the necessary information.

14 Xfinity has not adequately shown it has suffered cognizable damages under the
15 statutory scheme to sustain its claims. While violations give rise to civil liability under 15
16 U.S.C. § 1030(g), the provisions specify what kinds of “damage” or “loss” a plaintiff may
17 recover. The CFAA defines “damage” as “any impairment to the integrity or availability
18 of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8). “The term ‘loss’
19 likewise relates to costs caused by harm to computer data, programs, systems, or
20 information services.” *Van Buren*, 593 U.S. at 391 (citing 18 U.S.C. § 1030(e)(11)). As
21 the Supreme Court has explained, “[t]he statutory definitions of ‘damage’ and ‘loss’ thus
22 focus on technological harms—such as the corruption of files—of the type unauthorized
23 users cause to computer systems and data. Limiting ‘damage’ and ‘loss’ in this way makes
24 sense in a scheme ‘aimed at preventing the typical consequences of hacking.’” *Id.*
25 at 391–92 (citation omitted) (noting the definitions are ill-fitted to remediate misuse).¹²

26
27 ¹² 18 U.S.C. § 1030(e)(11) defines the term “loss” to mean “any reasonable cost to any
28 victim, including the cost of responding to an offense, conducting a damage assessment,
and restoring the data, program, system, or information to its condition prior to the offense,
and any revenue lost, cost incurred, or other consequential damages incurred because of
interruption of service.”

1 First, the authorized access claim under § 1030(a)(5)(C) requires the intrusion to
2 cause “damage and loss.” 18 U.S.C. § 1030(a)(5)(C). Xfinity does not allege it suffered
3 any “damage,” only that it suffered “loss” related to hiring the investigator. (Doc. 224
4 at 18 n.10.) The Court cannot ignore the plain language of the statute, and therefore this
5 claim also necessarily fails on this ground.

6 Next, Xfinity’s evidence pertaining to a “loss” falls short. Courts have interpreted
7 the definition of “loss” to make “clear Congress’s intent to restrict civil actions . . . to the
8 traditional computer ‘hacker’ scenario—where the hacker deletes information, infects
9 computers, or crashes networks.” *AtPac, Inc. v. Aptitude Sols., Inc.*, 730 F. Supp. 2d 1174,
10 1185 (E.D. Cal. 2010). It does not cover economic harm unrelated to the computer systems.
11 *Lukasian House, LLC v. Ample Int’l, Inc.*, No. CV-11-6449-JFW (FMOx), 2012 WL
12 13009130, at *3 (C.D. Cal. Apr. 20, 2012). Xfinity’s only evidence of loss relates to a
13 declaration from its investigator but there are no facts or statements to support what that
14 investigation entailed. (See Doc. 232 at 2–7; Doc. 232-2 at 2–3.) And even if this broad
15 assertion encompasses an investigation into conduct violative of the CFAA, Xfinity has
16 not showed that it suffered any technological harms relating to trafficking of passwords or
17 hacking. See *Van Buren*, 593 U.S. at 391; *hiQ Labs*, 31 F.4th at 1195 n.12. To infer such
18 harms would require the Court to speculate based on the existence of facts not presented.
19 See *Lakeside-Scott*, 556 F.3d at 802–03 (noting courts need not draw inferences based
20 solely on speculation). Therefore, the Court alternatively finds Xfinity has failed to
21 establish it suffered covered losses or damages to support its CFAA claims.

22 Accordingly, the Court will grant summary judgment for Global Guru on these
23 claims.

24 **G. Global Guru Holdings, LLC**

25 Global Guru moves for summary judgment in favor of Defendant Global Guru
26 Holdings on all claims, arguing the entity is not involved in this matter. (Doc. 210 at 17.)
27 Xfinity argues Global Guru Holdings and GGT are nothing more than Zahara’s alter egos.
28 (Doc. 224 at 5–6.) In reply, Global Guru characterizes Xfinity’s alter ego theory as a

reverse piercing of the corporate veil argument, which it contends is inapplicable here. (Doc. 241 at 2.)

Arizona courts will disregard the corporate entity and pierce the corporate veil if a plaintiff shows: (1) that the corporation is the alter ego or business conduit of a person; and (2) that disregarding the corporation's separate status is necessary to prevent injustice or fraud. *KeyBank Nat'l Ass'n v. Neumann Dermatology LLC*, No. CV-21-00133-PHX-JJT, 2022 WL 16635372, at *3 (D. Ariz. Nov. 2, 2022) (cleaned up). To establish liability, Xfinity must show that unity of control exists and that observance of the corporate entity would sanction a fraud or injustice. *Keg Restaurants Ariz., Inc. v. Jones*, 375 P.3d 1173, 1182 (Ariz. Ct. App. 2016). Reverse-piercing involves attempting to hold a corporation liable for the debts of its owners. *Sonoma Cnty. Chevrolet, Inc. v. Hardesty*, No. 1 CA-CV 14-0088, 2015 WL 848195, at *1 n.2 (Ariz. Ct. App. Feb. 26, 2015).

While it appears that Zahara is the sole employee, owner, operator, and controller of both GGT and Global Guru Holdings, (Doc. 226 at 11 ¶¶ 4–5), Xfinity has failed to support the second prong—the necessity of preventing a fraud or injustice. There are no facts to support that GGT to Zahara utilize Global Guru Holdings in any manner to perpetuate a fraud. There is also no evidence to support that GGT or Zahara use Global Guru Holdings to commit any wrong against Xfinity. Zahara has provided a declaration that he formed Global Guru Holdings but that the entity has never conducted any business and has never had a bank account, assets, or any customers. (Doc. 230-1 ¶ 4.) At this point, the allegations related to the claims discussed involve only Zahara and GGT. There is no evidence to suggest Global Guru Holdings is used to perpetuate a fraud or injustice. Therefore, the Court will grant summary judgment in Global Guru's favor and dismiss Global Guru Holdings from this action.¹³

IV. CONCLUSION

IT IS ORDERED granting Defendants' Motion for Leave to File Certain Portions of Defendants' Response to Motion for Summary Judgment and Exhibits 4, 5, 10 and 11

¹³ Global Guru also requests an award of attorney's fees. (Doc. 210 at 17.) The Court declines to award any attorney's fees or costs at this time.

1 of the Response and the Entire Controverting Statement of Facts and Exhibits Under Seal
2 (Doc. 227). The Clerk of the Court is directed to file the proposed unredacted versions of
3 those documents filed at Doc. 228 and Doc. 230 under seal.

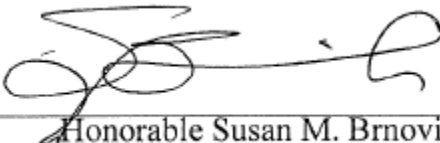
4 **IT IS FURTHER ORDERED granting** Plaintiffs' Motion for Leave to Seal
5 Plaintiffs' Reply in Support of Motion for Partial Summary Judgment (Doc. 235). The
6 Clerk of the Court is directed to file the proposed unredacted versions of those documents
7 filed at Doc. 231, Doc. 232, and Doc. 236 under seal.

8 **IT IS FURTHER ORDERED granting in part and denying in part** Defendants'
9 Motion for Summary Judgment (Doc. 209; Doc. 210) as follows. The Court will grant
10 Defendants' Motion with respect to Counts I, II, III, V, VI, VII, VIII, IX, X, and Plaintiffs'
11 alter ego theory against Defendant Global Guru Holdings, LLC and dismiss the same as
12 contained in Plaintiffs' Second Amended Complaint for Damages and Injunctive Relief
13 (Doc. 143.) The Court will also grant partial summary judgment for Defendants on Count
14 IV relating to the unjust enrichment claim as outlined in this Order. The Court will deny
15 Defendants' Motion with respect to Count IV in all other aspects and the standing issues.

16 **IT IS FURTHER ORDERED** instructing the Clerk of the Court to terminate
17 Defendant Global Guru Holdings, LLC from this case.

18 **IT IS FURTHER ORDERED denying** Plaintiffs' Motion for Partial Summary
19 Judgment (Doc. 203; Doc. 214; Doc. 220).

20 Dated this 13th day of May, 2025.

21
22
23 
24 Honorable Susan M. Brnovich
25 United States District Judge
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27
28